No. 13935

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARL WILLIAM BURKHOLDER,
Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE OLIVER J. CARTER, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney

GUY A. B. DOVELL
Assistant United States Attorney
Attorneys for Appellee

J. CHARLES DENNIS
Of Counsel

Office and Post Office Address:
324 Federal Building
Tacoma 2, Washington

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellant was convicted upon a plea of not guilty in the United States District Court for the Northern District of California, at Sacramento, sitting without a jury, of the crime of forging and uttering a United States Treasury check, in the amount of $44.40 in violation of Title 18, U.S.C.A. 495 (R. 5), and sentenced on September 19, 1952 to concurrent sentences

of two years imprisonment on each of the two counts contained in the indictment.

Thereafter he was received on October 16, 1952, at McNeil Island, with minimum expiration date of his sentence computed as April 27, 1954, and full term expiration date September 18, 1954.

Under date of May 18, 1953, appellant filed his Motion to Vacate Sentence with the Trial Court, and the same was denied. (R. 13.) Thereafter, appellant sought to appeal in forma pauperis, and the Trial Court certified that in the Court's opinion the appeal was not taken in good faith. (R. 12.)

On January 30, 1953 and February 10, 1953, the appellant filed his petitions for writ of habeas corpus in the Court below in Causes 1689 and 1691, respectively (R. 3 and 6), which because of no substantial difference were considered together at the hearing before the Court June 3, 1953 (R. 14) at which time the body of appellant was produced in court and he filed his written traverse (R. 10-11) to appellee's motion to dismiss. (R. 8-9.)

On June 4, 1953, the Court having taken the matter under advisement, made and entered an order denying both of appellant's petitions for writ of habeas corpus, and dismissing the several actions.

(R. 15-17.) From that final order, the appellant has been permitted to appeal in forma pauperis. (R. 18.)

QUESTIONS PRESENTED

Does either of appellant's petitions for writ of habeas corpus allege grounds for relief?

ARGUMENT AND AUTHORITIES

The Court below determined that appellant's several petitions were without merit, and the errors assigned were matters which should have been corrected, if correction was necessary, upon appeal, and the writ of habeas corpus could not be used as a substitute therefor. (R. 16.)

In connection with its determination, the Court cited on the issue of merit the case of *Buckner v. Hudspeth*, 105 F. (2d) 393, and on the issue of review, *Adams v. U. S. ex rel McCann*, 317 U.S. 269.

Aside from accepting the District Court's evaluation of the grounds for relief alleged in the petitions from the standpoint of merit within the scope of habeas corpus, the appellee is moved to re-assert in this Court the grounds of its motions to dismiss the petitions.

Under the terms and provisions of Title 28, U.S.C., Section 2255, relating to habeas corpus pro-

ceedings, the appellant was entitled to move the trial court that imposed the sentence, if subject to collateral attack, to vacate, set aside or correct the same *at any time* (italics ours) such section providing:

> *"An application for a Writ of Habeas Corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears* that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or *that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."*
> (Italics ours.)

It has been finally determined by the courts that the grounds for a motion to vacate, set aside or correct the sentence, and by which appellant has heretofore applied for relief to the sentencing court under said Section 2255, encompass all of the grounds that might be set up in an application for a writ of habeas corpus predicated on facts that existed, as here, at or prior to the time of the imposition of sentence, and such procedure by motion is not in any wise to be taken as preliminary to an application for such writ.

> *Barrett v. Hunter*, 180, F. (2d) 510;
> *United States v. Hayman*, 342 U.S. 205;
> *Jones v. Squier*, 195 F. (2d) 179;
> *Winhoven v. Swope*, 195 F. (2d) 181.

It is the contention, therefore, of the appellee, that the appellant has failed to allege or show in his

applications for a writ of habeas corpus that he has brought his actions, or either of them, within the terms of the statute, and that such jurisdiction is not to be presumed, since it is the appellant's burden to show affirmatively that the Court has jurisdiction to entertain his petitions.

See *Gorman v. Washington University*, 316 U.S. 98.

CONCLUSION

In view of the foregoing, the dismissal of both petitions should be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

GUY A. B. DOVELL
Assistant United States Attorney
Attorneys for Appellee

J. CHARLES DENNIS
Of Counsel